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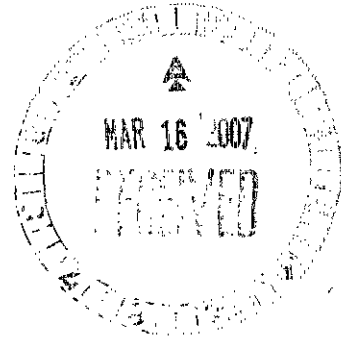
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March 12, 2007



VIA FEDERAL EXPRESS

Attn: Secretary
Surface Transportation Board
1925 "K" Street NW
Suite 700
Washington DC 20423

ENTERED
Office of Proceedings
MAR 16 2007
Part of
Public Record

RE: Savannah Port Terminal Railroad, Inc. – Petition for Declaratory Order-
Certain Rates & Practices as Applied to Capital Cargo, Inc.
STB Docket No. FD34920

Dear Secretary:

Please find enclosed an original and ten (10) copies of the following pleading:

SPTR's Motion to Strike Capital Cargo's Reply to SPTR's Motion to Dismiss Cross-Complaint.

Thank you for your attention to this matter. Should you have any questions, please do not hesitate to contact me. A copy has been provided to opposing counsel.

Sincerely,

P. Campbell Ford
P. Campbell Ford

Enclosure/

Original Motion to Strike
10 Copies of Motion to Strike

C: Daniel L. Rosenthal, Esquire (1 copy only)

218811

BEFORE THE
SURFACE TRANSPORTATION BOARD

STB Docket No. FD34920

SAVANNAH PORT TERMINAL RAILROAD, INC.- PETITION FOR
DECLARATORY ORDER- CERTAIN RATES AND PRACTICES AS APPLIED
TO CAPITAL CARGO, INC.

ENTERED
Office of Proceedings

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**SAVANNAH PORT TERMINAL RAILROAD, INC.'S ("SPTR'S") MOTION TO
STRIKE CAPITAL CARGO'S REPLY TO SPTR'S MOTION TO DISMISS
CROSS-COMPLAINT**

SUBMITTED ON BEHALF OF SAVANNAH PORT TERMINAL
RAILROAD, INC. BY

P. Campbell Ford, Esquire
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**BEFORE THE
SURFACE TRANSPORTATION BOARD**

STB Docket No. FD34920

**SAVANNAH PORT TERMINAL RAILROAD, INC.- PETITION FOR
DECLARATORY ORDER- CERTAIN RATES AND PRACTICES AS APPLIED
TO CAPITAL CARGO, INC.**

**SAVANNAH PORT TERMINAL RAILROAD, INC.'S ("SPTR'S") MOTION TO
STRIKE CAPITAL CARGO'S REPLY TO SPTR'S MOTION TO DISMISS
CROSS-COMPLAINT**

SPTR hereby files this Motion to Strike Capital Cargo's Reply ("Reply") to SPTR's Motion to Dismiss Cross-Complaint, and states:

SPTR filed a Motion to Dismiss Capital Cargo's Cross Claim because, *inter alia*, it appeared to be based upon a claim of breach of contract. While Capital Cargo may have intended to assert a statutory claim in the alternative, Capital Cargo pled the claim as a breach of contractual obligation by SPTR and Capital Cargo cannot escape the fact that any alleged statutory claims are based upon Capital Cargo's belief and claim that SPTR breached its contractual obligation to provide three (3) deliveries per day to Capital Cargo. Accordingly, Capital Cargo's Reply to the contrary is completely inaccurate and inconsistent with its Cross Complaint and should be stricken.

ARGUMENTS

The fact that Capital Cargo's Cross Complaint is based on its perceived contractual theory only becomes more and more evident with each of Capital Cargo's filings with the Surface Transportation Board ("STB"). "Capital Cargo's position is that SPTR is contractually obligated to provide the three switches per day", that demurrage

arising from SPTR's failure to fulfill its contractual service obligations is not properly assessed, and that SPTR is liable for damages accordingly. *Emphasis Added*. (See p. 3 of Capital Cargo's Reply). This is despite the fact that there is no contract between SPTR and Capital Cargo. Capital Cargo cannot now be heard to say that it has not pled its claim as a contractual claim, no matter how many footnotes it includes stating that the claim is pled in the alternative. This assertion is, at best, disingenuous and inaccurate and warrants the Reply to be stricken.

For instance, one of the five sources of relief sought by Capital Cargo is a declaration that SPTR's demurrage charges were unreasonable. The alleged unreasonableness is based upon the fact that Capital Cargo claims that SPTR was required to make three deliveries per day, based upon some phantom contract between the parties. SPTR has never changed its position that, in regards to the subject demurrage charges, there was no contract between the parties, and that there especially was not one requiring SPTR to make three (3) deliveries per day to Capital Cargo. However, and unlike SPTR's Petition to the STB for demurrage pursuant to the demurrage tariffs created in accordance with 49 U.S.C. § 10746, Capital Cargo has worded its Cross Complaint to be based upon an alleged contract and even states in its Cross Complaint that "SPTR's failure and/or refusal to provide Capital Cargo with three deliveries per day of three rail cars each violated SPTR's contractual obligations to Capital Cargo," (p. 18, ¶ 12), Capital Cargo has worded its Cross Complaint to be based upon an alleged contract. Any and all allegations by Capital Cargo to the contrary in its Reply should be stricken.

Another relief sought by Capital Cargo is damages, which again relates to Capital Cargo's belief that SPTR was contractually obligated to provide three deliveries per day.

The only damages that Capital Cargo might be entitled to is if there was in fact a breach of contract, which again is not an appropriate matter for the STB. Although SPTR remains adamant that there was no contract between SPTR and Capital Cargo, because Capital Cargo has clearly pled its Cross Complaint as being based upon this “contractual obligation,” not only can the STB not hear the Cross Complaint, but any and all allegations suggesting that the Cross Complaint is pled in the alternative to a contractual theory must be stricken.

Perhaps even more problematic for Capital Cargo, however, is that the majority and remainder of Capital Cargo’s relief sought is present-tense, for which, as of May 19, 2005, there is a settlement agreement between the parties (which is the only written agreement between these parties) resolving these issues. For instance, Capital Cargo asks the STB to enter an Order (1) declaring that SPTR may not fail or refuse to make three deliveries per day to Capital Cargo, (2) declaring that SPTR may not charge demurrage arising from SPTR’s failure and/or refusal to make three deliveries of three rail cars each to Capital Cargo, and (3) declaring that SPTR may not refuse to provide service unless Capital Cargo pays demurrage charges arising from SPTR’s failure and/or refusal to make three deliveries per day of three rail cars each to Capital Cargo. (pp. 18-19; Capital Cargo’s Cross Complaint). This relief requested falls under the present settlement agreement that was entered into by the parties on May 19, 2005 (and is thus a matter outside of the STB’s jurisdiction).

Significantly, Capital Cargo admits in its Reply that, “the settlement agreement has nothing to do with Capital Cargo’s effort to avoid paying improper demurrage charges and also to recover damages.” (p. 6, Reply). In regards to the demurrage

accrued, the May 2005 settlement agreement is clearly irrelevant as it post-dates the outstanding demurrage. As to Capital Cargo's request for the STB to essentially interpret the number of deliveries per day, whether demurrage can be charged if less than three (3) deliveries per day, etc. under the May 19, 2005 settlement agreement, the agreement is totally irrelevant. The terms of the agreement clearly leave open the question of the resolution of SPTR's demurrage claim by the STB, but the future delivery issues are resolved. These legal and factual truths clearly warrant striking any and all claims by Capital Cargo that the present-tense relief requested is not based upon a contract.

SUMMARY

Unlike SPTR's Petition to the STB¹, Capital Cargo's Cross Complaint clearly states that it is based upon Capital Cargo's belief and claim, even though there is no contract, that SPTR was contractually obligated to provide it with three deliveries per day. Although Capital Cargo tries to save its Cross Complaint by adding excessive footnotes claiming that the Cross Complaint is being pled in the alternative to a contractual claim, the footnotes do not change the fact that Capital Cargo acknowledges its contractual belief in its facts, arguments, and requests for relief. All relief sought, including statutory, and allegations made in Capital Cargo's Cross Complaint relate to its belief and claim that SPTR was contractually obligated to make three (3) deliveries per day. Accordingly, Capital Cargo's Reply, suggesting that the Cross Complaint is stated

¹ Not surprisingly, since there was no contract between the parties when the demurrage accrued, SPTR's Petition to the STB is not pled in a way that even remotely suggests that the relief sought is based upon a contract. Instead, SPTR's Petition is based upon the applicable demurrage tariffs that both parties acknowledge were not a part of any contract. SPTR's Petition regarding demurrage tariffs created pursuant to 49 U.S.C. § 10746 and Capital Cargo's Cross Complaint based upon some alleged contract are not one and the same and cannot be properly presented as claims that mirror each other.

in the alternative to a contractual theory, is completely inconsistent with the allegations in the Cross Complaint and should therefore be stricken.

VERIFICATION

I, P. Campbell Ford, declare under penalty of perjury that the foregoing is true and correct and that that I am qualified and authorized to file this pleading. Executed on March th12, 2007.



P. Campbell Ford, Esq.

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true copy of the foregoing has been furnished to Secretary Surface Transportation Board, 1925 "K" Street NW, Suite 700, Washington, DC 24023 via overnight mail and to Daniel L. Rosenthal, Verrill Dana LLP, P.O. Box 586, One Portland Square, Portland, ME 04112-0586 via U.S. Regular Mail on this th12 day of March 2007.

Dated: March 12, 2007

Respectfully submitted,


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